85 - 1904

Supreme Court, U.S.
FILED
MAY 20 1986
JOSEPH F. SPANIOL, JR.
CLERK

No.

In The
Supreme Court Of The United States

OCTOBER TERM, 1985

PENELOPE KINNEY,
Petitioner

v.

HOWARD KINNEY

ON WRIT OF CERTIORARI
TO THE APPELLATE COURT OF CONNECTICUT

PETITION FOR CERTIORARI AND MOTION TO VACATE THE JUDGMENT BELOW

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May, 1986

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QUESTIONS PRESENTED

Whether or not the petitioner was deprived of her rights protected under the Due Process Clause of the Fourteenth Amendment in an action for dissolution of marriage and other relief tried before a state referee acting as a court where the petitioner was notified by the court of the trial date and that date was advanced three days without notice to the petitioner.

TABLE OF CONTENTS

	Page
Opinions below.....	1
Jurisdiction.....	2
Constitutional and statutory provisions involved.....	3
Statement.....	4
Argument.....	14
Conclusion.....	19
Appendix A	
Opinion of the Appellate Court of Connecticut.....	1a
Appendix B	
Memorandum of Decision of the Superior Court of Hartford County, Connecticut.....	5a
Appendix C	
Judgment of the Superior Court..	12a
Order on Motion to Reopen.....	16a
Order on Motion to Reargue.....	19a
Order on Petition for Review....	20a
Official Report on Order on Petition for Review.....	22a
Appendix D	
Order on Application for Waiver.	23a
Appendix E	
Portions of the Transcript of the Trial.....	27a

Page

Appendix F
Connecticut General Statute.... 42a

TABLE OF AUTHORITIES

Cases:

Halldorson v. Halldorson, 175 Mont. 170 (1977)..... 3,19
Leveston v. Leveston, 182 Conn. 19, 23-24, 437 A2d. 819 (1980)..... 17
MacKenna v. Ellis, 280 F2d 592, 603-604 (1960).....3,14,18
Ridgeway v. Ridgeway, 180 Conn. 533, 538, 429 A.2d 801 (1980)..... 17
State v. Reardon, 245 Minn. 509, 510, 511, 513..... 17
Thode v. Thode, 190 Conn. 694, 697, 462 A.2d 4 (1983)..... 17
Vossbrinck v. Vossbrinck, 194 Conn. 229, 232, 478 A.2d 1011 (1984)..... 17

Constitution and Statute:

United States Constitution:
Fourteenth Amendment.....passim
Connecticut Constitution:
Article I, Section 8..... 4
Conn. Gen. Statute 46b-51..... 4,18

Miscellaneous:

Cong. Quar. Inc., Guide To The U.S. Supreme Court, p. 533 (1979)..... 4,5
Am. Jur. 2d..... 5,7

IN THE SUPREME COURT OF

THE UNITED STATES

OCTOBER TERM, 1985

No. ____

PENELOPE KINNEY, Petitioner

v.

HOWARD KINNEY

ON WRIT OF CERTIORARI

TO THE APPELLATE COURT OF CONNECTICUT

PETITION FOR CERTIORARI

AND MOTION TO VACATE
THE JUDGMENT BELOW

OPINIONS BELOW

The order of the Supreme Court of Connecticut denying a petition for cer-

tification for review is reported at 199 Conn. 804. The opinion of the Appellate Court of Connecticut is reported at 5 Conn. App. 484. The order denying a motion to reargue and the Memorandum of Decision by the Superior Court of Hartford County, Connecticut are unreported. They are, however, reprinted in the Appendices attached hereto, with the order on reopening.

JURISDICTION

The Appellate Court of Connecticut entered a final determination of no error in the judgment of the Superior Court of Hartford County, Ct. on November 19, 1985. The Appellate Court denied a motion to reargue on February 13, 1986 and the Supreme Court of Connecticut denied a petition for certification for review on March

12, 1986. In the petitioner's pleadings, briefs and arguments the issue of lack of notice and thus the question of due process under the Fourteenth Amendment was presented to the state courts, the decisions of which are in conflict with the decisions of state supreme courts and federal courts of appeals in cases involving identical questions. The jurisdiction of this Court is invoked under 28 U. S. C. 1257(3). Halldorson v. Halldorson, 175 Mont. 170 (1977); MacKenna v. Ellis, 280 F.2d 592 (1960).

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

The Fourteenth Amendment to the United States Constitution provides in pertinent part:

* * *No state shall* * *deprive any

> person of life, liberty or property without due process of law; nor deny to any person within its jurisdiction the equal protection of the laws.

The first Article of the Constitution of Connecticut, Section 8 provides in part:

> * * *No person shall be* * * deprived of life, liberty or property without due process of law* * *

Section 46b-51 of the Connecticut General Statutes is reprinted in App.F 42a-43a.

STATEMENT

This case involves the question of whether or not the petitioner's rights under the due process and equal protection clauses of the Fourteenth Amendment were denied. "The Supreme Court has held that in civil and criminal proceedings alike, notice must be given promptly and with sufficient specificity to permit preparation of an ade-

quate defense." Cong. Quar. Inc., Guide to U. S. Supreme Court (1979). "* * *an error complained of may be ground for reversing a judgment where a constitutional or statutory right has been violated, although the error may appear to be otherwise harmless. But otherwise harmless error may not be changed to reversible error by reason of alleged infringement on due process if the error does not impair the essential elements of due process, which are notice and an opportunity to be heard in an orderly proceeding adapted to the nature of the case." 5 Am. Jur. 2d Appeal and Error Sec. 791, p. 232.

An action for dissolution of marriage was brought against the petitioner, Penelope Kinney, in June of '81 returnable to the Superior Court of

Hartford County, Ct. by July 14, 1981.

The case went to judgment before a state referee in June of 1984. The petitioner had a pro se appearance in the case since it was brought and for that reason was notified by the court that the case was scheduled on the limited contested trial list for June 21, 1984. The case went forward on June 18, 1984, without Mrs. Kinney's knowledge.

The petitioner filed a motion to reopen the judgement on June 26, 1984. By that action she raised the question of due process arguing that she had not been duly notified of the trial date which had been advanced three days.

At the hearing on the motion, defense counsel testified that he had informed the petitioner of the trial date, by phone on the Thursday before the trial which occurred on a Monday. He also

had stated this at the opening of the trial (App.E 29a) and told the court that at that time he and the petitioner discussed the matter of requesting a continuance. "It is to be noted* * * that the general rules governing applications for continuances are not strictly enforced in divorce cases. In such cases it is the policy of the trial court to be most liberal in granting continuances, because the public, as well as the parties to the action, is interested in the result of the suit, and the public interest demands that both the plaintiff and the defendant should have full oportunity to present all their evidence.* * * *" 24 Am. Jur. 2d Section 346, p. 415. The petitioner expected defense counsel to request that continuance on the 21st of June, the date on which the case appeared on

the limited contested trial list which the Hartford County Superior Court Clerk's office had sent to the petitioner three weeks in advance.

At the hearing on the motion to reopen the judgment, defense counsel testified that on the day he phoned Mrs. Kinney to inform her of the trial date, they discussed a motion to modify pendente lite orders filed by the plaintiff in May of '84 which had appeared on another list sent to Mrs. Kinney by the court clerk and assigned for the 19th of June, 1984. Defense counsel testified that the two matters they discussed, the trial and the motion to modify could have possibly confused her.

The court accepted defense counsel's testimony that he had notified Mrs. Kinney of the trial date and denied

her motion to reopen the judgment.

The petitioner then filed, on Sept. 14, 1984, an application for waiver of fees and costs to prosecute an appeal for reasons of indigency. (App.D, 23a). Mrs. Kinney told the court that she had been unemployed since a week be- the trial. Thus, the unsigned, undated financial affidavit submitted by defense counsel at the trial (App.E,34a) re- flected an income Mrs. Kinney was no longer receiving. Defense counsel had told the court at the trial that Mrs. Kinney had left papers in support of re- questing a continuance at his office on the Friday, immediately preceding the trial which was held on Monday. (App. E, 30a) Had the petitioner been noti- fied of the advanced trial date, she would not have submitted a financial

affidavit which reflected an income she was no longer receiving and so was detrimental to her own financial position. On the Friday Mrs. Kinney left papers in support of requesting a continuance, presuming counsel would request it on the 21st of June, at defense counsel's office, she would have signed and prepared a true affidavit had she been aware the case would be tried the next Monday. The court granted the application.

An appeal was filed in the Appellate Court of Connecticut on October 2, 1984. The question of notice presented on appeal was the same as that raised in the pleading before the lower court. The question was raised by the brief and argument of the petitioner. The pleading was part of the record before the Appellate Court.

In her brief, the petitioner stated that she'd received notice from the Superior Court Clerk's office that two matters pertaining to the case were scheduled the week the case was tried: A motion to modify pendente lite orders and the trial for dissolution on June 19, 1984 and June 21, 1984 respectively.

The unsigned, undated financial affidavit submitted by defense counsel at the trial on Mrs. Kinney's behalf (App. E, 34a) had been prepared in May '84 for a hearing on the motion for modification filed by the plaintiff in May and discussed at the hearing to reopen the judgment.

At the appeal hearing, petitioner argued orally that she was unemployed on the date of the trial, though the memorandum of decision (App.B, 6a) stated the contrary, and so the financial

affidavit reflected an income she was no longer receiving. The petitioner would not have submitted such a document to a trial court.

The petitioner also argued that plaintiff's counsel's remarks about petitioner's alleged misconduct in a prior reference (App.E,31-32a)were groundless; that evidence that petitioner had corresponded with her former attorney about her illness at the time of this reference of May, 1983, was presented in the appendix of her reply brief as a copy of the certified receipt counsel's office had signed and returned to the petitioner, dated April 16, 1983. For this reason that subpoena was unreasonable as well as, according to plaintiff's counsel (App.E, 39a) an infringement of the petitioner's rights, stated in opposition to defense

counsel's renewed oral motion for a continuance (App. E, 37a) and seemingly contradictory to his own previous objecto the granting of a continuance. (App. E, 31a).

The Appellate Court of Connecticut specifically decided against the petitioner on the question presented to this Court, addressing the matter not as a violation of a constitutional right but as a matter of the trial court's discretion as to whether or not a continuance should have been granted. (App. A, 2a-3a).

In rejecting the petitioner's contentions, the Appellate Court denied the petitioner her constitutional right of due process which is essentially notice, hearing, equal protection of the laws, and effective counsel all of which are deemed to ensure a fair trial.

ARGUMENT

Notice and hearing are essential to due process and there is nothing in the record to show that the petitioner was ever notified of the trial that occured on June 18, 1984 except for defense counsel's affirmation (App.E, 29a)that he verbally notified the petitioner on the Thursday preceding the trial which was held on a Monday and would have constituted only two days notice with a weekend intervening if counsel had informed the petitioner of this specific trial date, which conflicted with the trial date assigned on the list sent to Mrs. Kinney by the court as June 21, 1984. cf. MaKenna v. Ellis, 280 F.2d 592, 603 at 8 (1), 604 (2) reversed.

Circumstances of the trial offend against the due process clause in numerous respects: Defense counsel submit-

ted an unsworn financial affidavit to the court on behalf of the petitioner which the court accepted. (App. E,37a) The submission of an unsworn financial affidavit for purposes of determining the petitioner's financial status which would be determinate in the courts subsequent financial awards and division of property certainly offends against the concept of a fair trial and the right to effective assistance from counsel. If the court didn't rely on the document to effect such financial and property determinations, the absence of such information would still be detrimental to the petitioner's position.

In addition to these offenses against due process, an atmosphere of prejudice against the petitioner had been created by plaintiff's counsel's remarks about the petitioner's alleged miscon-

duct at a prior reference of which defense counsel was not apprised and so could not defend and which later became part of the information on which the trial court and the Appellate Court rendered its respective decision and determination. (App. A, 3a)."The court also noted the defendant's previous reluctance to appear." (App.B, 6a)
"The defendant has previously shown a reluctance to appear in court. In fact, she failed to appear at a prior assignment for trial. On that occasion she did not appear even though she was subpoened." Counsel's remarks and the Courts' acceptance of them, in the petitioner's absence in the first instance and despite evidence to the contrary on appeal, indicates the prejudicial strength of those remarks which deprived the petitioner of a fair trial.

cf. State v. Reardon, 245 Minn. 509, 510, 511, 513 reversed.

In every case on which the Appellate Court relied to determine no error on the issue of whether or not a continuance should have been granted, But see Vossbrinck v. Vossbrinck, 194 Conn. 229, 232, 478 A.2d 1011 (1984), cert. denied, U.S. , 105 S. Ct. 2048, 85 L. Ed. 2d 311 (1985) and Thode v. Thode, 190 Conn. 694, 697, 462 A.2d 4 (1983) and Ridgeway v. Ridgeway, 180 Conn. 533, 538, 429 A.2d 801 (1980) and Leveston v. Leveston, 182 Conn. 19, 23-24, 437 A.2d 819 (1980), the defendant was present at the trial and had at least three weeks notice of it. These were not the circumstances in the petitioner's case. Further, the issue was not but for the refusal of the continuance, the petitioner would have had a

fair trial. The question is whether or not the petitioner had any trial. There is no trial without due process. cf. MacKenna v. Ellis 280 F2d 592, 603, 604 (excepting (3) and (4) and the phrase "inexperienced counsel".) reversed.

Counsel did not object to the grounds for the judgment, which is irretrievable breakdown, even though a cross-complaint had been filed and is part of the record nor the terms of the judgment which are, with respect to alimony and property division clearly in favor of the plaintiff and in violation of the Connecticut General Statute 46b-51 and so offends against the equal protection clause of the Fourteenth Amendment. (App. F, 42-43a)

"It is well settled that notice and opportunity to be heard are essential elements of due process." In a case

of dissolution of marriage where the defendant was notified, present at the trial and did not object to the discontinuance of the trial before he had a chance to testify, that decision was reversed. See Halldorson v. Halldorson 175 Mont. 170 (1977) reversed. It was reversed on a single issue of due process--he was not heard. And it would seem under the circumstances, he had more chance of being heard than the petitioner had.

CONCLUSION

For the foregoing reasons it is respectfully submitted that the petition for certiorari be granted and the judgment below vacated.

Penelope Kinney
pro se

APPENDICES

Appendix A

Opinion of the Appellate Court

of Connecticut

(Connecticut Law Journal
November 19, 1985)

HOWARD KINNEY *v.* PENELOPE KINNEY
(3596)

SPALLONE, DALY and HADDEN, Js.

On appeal by the defendant from the judgment dissolving her marriage to the plaintiff, *held:*

1. The trial court did not, under the circumstances here, abuse its discretion in denying the defendant's motion for a continuance.
2. The trial court's determination as to the value of the plaintiff's assets did not constitute an abuse of that court's discretion.
3. The trial court's decision regarding financial awards and the division of the parties' property was reasonable and supported by the evidence presented.

Argued September 17—decision released November 19, 1985

Action for the dissolution of a marriage, and for other relief, brought to the Superior Court in the judicial dis-

trict of Hartford-New Britain at Hartford and referred to *Hon. John M. Alexander,* state trial referee; after the defendant's motion for a continuance was denied, the court rendered judgment dissolving the marriage and granting certain other relief, from which the defendant appealed to this court. *No error.*

Penelope Kinney, pro se, the appellant (defendant).

John A. Berman, with whom, on the brief, was *John K. Currie,* for the appellee (plaintiff).

SPALLONE, J. The defendant appeals from the judgment of the trial court dissolving the marriage of the parties. The defendant claims that the trial court abused its discretion in denying her motion for a continuance, in determining the value of the plaintiff's assets, in effecting a property settlement, and in making financial awards.

Regarding the defendant's first claim of error, it is clear that a motion for continuance is addressed to the trial court's discretion, and the court's ruling on such a motion will not be disturbed unless a clear abuse of that discretion is shown. *Vossbrinck* v. *Vossbrinck,* 194 Conn. 229, 232, 478 A.2d 1011 (1984), cert. denied, U.S. , 105 S. Ct. 2048, 85 L. Ed. 2d 311 (1985). The reviewing court is especially hesitant to find such an abuse of discretion where, as here, the lower court has denied a motion for continuance made on the day of trial. *Thode* v. *Thode,* 190 Conn. 694, 697, 462 A.2d 4 (1983). "Every reasonable presumption in favor of the proper exercise of the trial court's discretion will be made." *Ridgeway* v. *Ridgeway,* 180 Conn. 533, 538, 429 A.2d 801 (1980).

The record discloses that the action for dissolution was instituted in June, 1981. The original trial date was May 18, 1983. The defendant failed to appear on that

date despite being subpoenaed by her own counsel. At that time, counsel for the defendant sought a continuance on the ground that the defendant was physically unable to attend the trial. The court granted the requested continuance. The case was rescheduled and ultimately tried on June 18, 1984, thirteen months after its original trial date. Again the defendant failed to attend, and again her counsel[1] moved for a continuance, the basis being that the defendant was not properly prepared. The court denied the defendant's request, noting that there had been a considerable amount of discovery in the case, and that the case had been pending for almost three years. The court also noted the defendant's previous reluctance to appear. Under these circumstances, we cannot say that the trial court abused its discretion in denying the defendant's request for a continuance. See *Thode* v. *Thode*, supra; *Leveston* v. *Leveston*, 182 Conn. 19, 23–24, 437 A.2d 819 (1980).

The second issue to be addressed is whether the trial court abused its discretion in determining the value of the plaintiff's assets. At trial, the sole evidence concerning the value of these assets consisted of the plaintiff's own testimony. The court noted that the plaintiff was closely cross-examined, and concluded that there was no reason to question his veracity. The trier of facts was free to accept or reject any portion of the evidence of either party. *Leo* v. *Leo*, 197 Conn. 1, 6, 495 A.2d 704 (1985); *Smith* v. *Smith*, 183 Conn. 121, 123, 438 A.2d 842 (1981); *Hirst* v. *Hirst*, 2 Conn. App. 348, 350, 478 A.2d 618 (1984). Having only the plaintiff's testimony to consider, and having no reason to question that testimony, we conclude that the trial court acted reasonably in accepting it and in using it to determine the value of the plaintiff's assets. See *Leo* v. *Leo*, supra, 9.

[1] At this point, the plaintiff had retained new counsel.

The defendant's remaining claims of error relate to the trial court's decision concerning financial awards and its division of the parties' property. Again, the dispositive issue is whether the trial court abused its discretion or whether it could have reasonably concluded as it did. *Timm* v. *Timm*, 195 Conn. 202, 207, 487 A.2d 191 (1985); *Carpenter* v. *Carpenter*, 188 Conn. 736, 741–42, 453 A.2d 1151 (1982); *Bisson* v. *Bisson*, 5 Conn. App. 67, 69, 496 A.2d 543 (1985).

In determining such matters, the trial court must consider the length of the marriage and the causes of its dissolution, and the age, health, station, occupation, amount and sources of income, vocational skills, employability, estate, liabilities, needs and future potentials of each of the parties. General Statutes §§ 46b-81 (c), 46b-82; see *Levy* v. *Levy*, 5 Conn. App. 185, 188, A.2d (1985). It is apparent from a review of the trial court's memorandum of decision that the court weighed these factors in reaching its determination of the appropriate financial awards and division of property. We cannot, as an appellate court, vary the weight which the trial court placed upon such factors. *Carpenter* v. *Carpenter*, supra, 742. Moreover, it is not the function of this court to retry the facts. *Leo* v. *Leo*, supra, 4; *Carpenter* v. *Carpenter*, supra, 741–42; *Hirst* v. *Hirst*, supra, 350. We conclude that the decision of the trial court regarding the financial awards and division of property was reasonable and supported by the evidence presented. See *Hirst* v. *Hirst*, supra, 350–51.

There is no error.

In this opinion the other judges concurred.

Appendix B

No. 261162 SUPERIOR COURT

HOWARD KINNEY JUDICIAL DISTRICT

VS. HARTFORD/NEW BRITAIN

PENELOPE KINNEY JUNE 20, 1984

MEMORANDUM OF DECISION

This case came before the court on June 18, 1984 after an assignment of long-standing duration. The plaintiff appeared with his attorney; however, the defendant failed to appear, although her counsel appeared and orally moved for a continuance. He told the court that he had advised his client of the assignment and that she stated she would not come because she wished for more discovery work to be done. It was noted that there had been a considerable amount of discovery in this case, which has been pending for almost three years. It was also noted that there was no va-

lid reason given-due to poor health or otherwise-for the defendant's failure to appear. The court accordingly denied the motion for a continuance. The defendant has previously shown a reluctance to appear in court. In fact, she failed to appear at a prior assignment for trial. On that occasion she did not appear even though she was subpoened.

The plaintiff is now age fifty and the defendant age thirty-nine. So far as appears the defendant is in good health; the plaintiff on the other hand has high blood pressure. He has been a laborer in construction work for most of his life and possesses a high school education. The defendant has a B.A. and an M.A. degree and has held jobs as a substitute teacher and also as an office worker. She is working now, but because she has seen fit not to provide

the court with a sworn financial affidavit, her present earnings are not known. (Her prior affidavit of December 1983 indicates a net income of $77.00 per week). The defendant's present assets are also not known, but it is apparent that they are much less than the plaintiff's, which are in excess of $100,000.00.

The parties were married nineteen years ago. However, they have lived together for only five of those nineteen years. It may be said that from its beginning the marriage was not a success. She was domineering, would not do the housework and the sexual relations were poor. The plaintiff, after a few years, formed a liason with another woman with whom he is presently living. Nine months after the date of the marriage a daughter, Heather, was born to the par-

ties. She is now over age eighteen.

During the entire time of the separation of over fourteen years the plaintiff has faithfully supported the defendant and Heather. In fact he has in addition given them during the past eleven years and up to the present time the use of a house which he has maintained entirely, including all taxes, repairs, and upkeep so that the defendant has lived throughout the period rent-free. He has also paid Heather's school tuition and also paid some of the expenses of the defendant in obtaining her college education.

The plaintiff has inherited from his father and has made some profits from the sale of some few pieces of real estate. However, much of those profits were used for various living expenses and for the education of Heather and

the defendant. The plaintiff testified and was closely cross-examined as to his assets. So far as appears from his testimony the court finds no reason to question his veracity in this regard.

Although the parties have been married for nineteen years, they lived as husband and wife for a relatively short time. In view of this and also their relative skills, education, ages, the contributions of each, the fact that both appear to have been equally at fault as to the cause of the marriage breakdown, and all the other factors stated in General Statutes 46b-82 the following judgment may enter:

1. A decree of dissolution of the marriage may enter on the ground of irretrievable breakdown.

2. The plaintiff is ordered to pay periodic alimony to the defendant, non-

modifiable, in the monthly sum of $300.00 beginning on July 1, 1984 and ending on June 1, 1985. No further alimony shall be paid thereafter. The plaintiff is also ordered to maintain the house where the defendant is now living, as he has in the past, until September 1, 1984 or sooner, if the defendant vacates the premises on or before said date of September 1, 1984. The purpose of the year's periodic alimony is to afford to the defendant time to re-adjust her mode of living.

3. The plaintiff is ordered to pay towards the defendant's counsel fees the sum of $500.00 on or before August 1, 1984 in partial payment thereof.

4. The defendant is ordered to quitclaim to the plaintiff her ownership and title in the lot in Naples.

/s/ John M. Alexander

John M. Alexander

State Trial Referee

Appendix C

STATE OF CONNECTICUT

Docket No. FA-81-0261162 SUPERIOR COURT

HOWARD KINNEY of the
Town of East Hampton
County of Middlesex
and State of Connecti-
cut

J.D. of Hartford/
New Britain

VS.

At Hartford

PENELOPE KINNEY of the
Town of Newington,
County of Hartford
and State of Connecti-
cut

June 20, 1984

Present: The Hon. John M. Alexander,
State Trial Referee

JUDGMENT

This action, by writ, and complaint, claiming a dissolution of the marriage of the parties and other relief, as on file came to this Court on July 14, 1981, and thence to later dates when the Defendant appeared and the action was claimed for the family relations list and when the Plaintiff appeared to

prosecute the claim for a dissolution of the marriage.

The Court, having heard the evidence finds the following:

1. The husband and the wife, by the name of Penelope Brown, were lawfully married on October 19, 1964 at Baltimore, Maryland.

2. One party has resided continuously in this State twelve months next before the date of the filing of the complaint or next preceding the date of this decree, and all statutory stays have expired.

3. The marriage of the parties has broken down irretrievably.

4. No minor children have been born to the wife since the date of the marriage.

WHEREUPON, it is adjudged that the marriage of the parties to this action

be, and it is hereby dissolved, and they are each hereby declared to be single and unmarried. The following orders are hereby entered:

1. The plaintiff husband shall pay periodic alimony to the defendant, nonmodifiable in the monthly sum of $300.00 beginning on July 1, 1984 and ending June 1, 1985. No further alimony shall be paid thereafter.

2. The plaintiff husband shall maintain the house where the defendant wife is now living, as he has in the past, until September 1, 1984, or sooner if the defendant vacates the premises before said date.

3. The defendant wife is hereby ordered to vacate said premises on or before said date of September 1, 1984. The purpose of the year's periodic alimony is to afford the defendant time

to readjust her mode of living.

4. The plaintiff is ordered to pay toward the defendant's counsel fees the sum of $500.00 on or before August 1, 1984 in partial payment thereof.

5. The defendant is ordered to quit claim to the plaintiff her ownership and title to the lot in Naples, Florida.

BY THE COURT

/s/ Paul Levine
Deputy Chief ~~JUDGE~~/CLERK

I hereby certify the foregoing judgment file conforms to the judgment entered by the court.

/s/ John A. Berman
John A. Berman

/s/ Curtis H. Roggi
Curtis H. Roggi

DOCKET NO. FA 0261162 SUPERIOR COURT

HOWARD KINNEY JUDICIAL DISTRICT OF HARTFORD/NEW BRITAIN AT HARTFORD

VS.

PENELOPE KINNEY JUNE 26, 1984

MOTION TO REOPEN
JUDGMENT OF DISSOLUTION

Defendant in the above-captioned matter, Penelope Kinney, hereby represents as follows:

1. On June 21, 1984 this matter appeared on the Limited Contested List.

2. On that date, the Defendant's attorney, Curtis Roggi, was to ask for a continuance in order to have time to receive information about the Plaintiff's true assets which would have proven some statements on his disclosures false.

3. The case went forward on June 18, 1984 without the Defendant's knowledge.

4. The Defendant was neither informed, present or prepared for a trial by State Referee, John Alexander.

WHEREFORE, the DEFENDANT Petitions this Court to reopen the judgment of dissolution entered on June 18, 1984, and to restore the matter to the trial docket.

DEFENDANT

/s/BY Penelope Kinney
Penelope Kinney, Pro Se

September 10, 1984

Motion denied in open Court

/s/ John M. Alexander,
State Trial Referee

O R D E R

The foregoing motion having been heard, it is hereby ORDERED

GRANTED/DENIED

BY THE COURT

_____
CLERK

7/13/84 Referred to Hon. John Alexander, STR.

(Hennessy. J.)

/s/ S. L. Riger a/c

No. AC-3596 APPELLATE COURT

HOWARD KINNEY STATE OF CONNECTICUT

VS.

PENELOPE KINNEY FEBRUARY 13, 1986

ORDER

The motion of the Defendant, filed November 27, 1985, to Reargue, Having been presented to the Court, It is hereby O R D E R E D DENIED

BY THE COURT

Francis J. Drumm, Jr.
Chief Clerk

/s/ Michele T. Angers
Assistant Clerk-Appellate

NOTICE SENT: Feb. 14, 1986
Penelope Kinney, Pro Se
Berman, Bourns & Currie
Trial Court - Hartford
#0261162
Reporter of Judicial Decisions
pb

SUPREME COURT

STATE OF CONNECTICUT

No. PSC-85-1088

Howard Kinney

v.

Penelope Kinney

ORDER ON PETITION FOR
CERTIFICATION TO APPEAL

On consideration of the petition by the defendant for certification to appeal from the Appellate Court (5 Conn. App. 484) it is hereby ordered that said petition be, and the same hereby is denied.

BY THE COURT,

/s/ Cynthia M. Tworek
Assistant Clerk-Appellate

Dated: March 12, 1986
Notice to: 3/13/86
Clerk, Superior Court, Hartford--261162
Clerk, Appellate Court
Penelope Kinney, pro se
Berman, Bourns & Currie

Penelope Kinney, pro se in support of

petition---John A. Berman in opposition.

199 Conn. 804

HOWARD KINNEY v. PENELOPE KINNEY

The defendant's petition for certification for appeal from the Appellate Court, 5 Conn. App. 484, is denied.

Penelope Kinney, pro se, in support of the petition.

John A. Berman, in opposition.

Decided March 12, 1986

Appendix D

DOCKET NO. FA 81 0261162 APPELLATE COURT

HOWARD KINNEY — JUDICIAL DISTRICT OF HARTFORD AT HARTFORD

VS.

PENELOPE KINNEY — SEPTEMBER 14, 1984

APPLICATION FOR WAIVER OF FEES AND PAYMENT OF COSTS

The defendant in the above entitled matter respectfully represents that

1. She has a right and intends to take an appeal from the final judgment rendered in a civil action of marital dissolution, the Docket number of which is written above.

2. To bring such an action and return it to the above named court she will have to pay the following fees and costs

Entry Fee $100.00

Security for Costs $150.00

3. Unless the entry fee is waived

and provision is made to waive the requirement of Sec. 3014 concerning the furnishing of security for costs upon appeal and an order be granted that the necessary expenses of prosecuting the appeal be paid by the state she will be deprived of her right to take said appeal.

4. She is unable to pay said fees and costs because of indigency.

WHEREFORE, she respectfully requests that the entry fee be waived and that the State be ordered to pay the necessary expenses of prosecuting the appeal.

/s/ Penelope Kinney

9/24/84 granted in open court

Subscribed and sworn to
before me on 9/14/84

/s/ Shelbi Shefter Esp 6-87
Notary Public

/s/ Alexander, Trial Judge

O R D E R

The foregoing application and accompanying affidavit having been examined (and a hearing held thereon), the Court finds

1. The Defendant has a right to take an appeal and return it to this Court.

2. Unless the entry fee and requirement of Sec. 3014 are waived she will be deprived of her right to said appeal.

Now therefore, it is hereby ordered

1. That the fee for entering the appeal in this court be waived and that the requirement of Sec. 3014 concerning the furnishing of security for costs be waived.

2. That the State of Connecticut pay any necessary expenses of prosecuting the appeal.

BY THE COURT

/s/(Alexander J.)

_____

Assistant Clerk

Appendix E

No. 26 11 62	SUPERIOR COURT
HOWARD KINNEY	OF HARTFORD/ NEW BRITAIN AT HARTFORD
VS.	
PENELOPE KINNEY	JUNE 18, 1984

BEFORE:

HONORABLE JOHN ALEXANDER, STATE REFEREE

APPEARANCES:

For the Plaintiff

John Berman
Attorney at Law

For the Defendant

Curtiss Roggi
Attorney at Law

Donna Mainville
Court Reporter

THE COURT: Now, is this case ready to proceed?

MR. BERMAN: Yes, Your Honor.

MR. ROGGI: Your Honor, for the Defendant, I'm going to move for a continuance for approximately three weeks. The reason being, Your Honor is that my client feels that there has not been proper and adequate disclosure by the Plaintiff of the assets he may or may not have. I wrote a letter to Mr. Berman dated May 18th, stating our concerns about some financial affidavits and the interrogatories and depositions that have been previously taken concerning this divorce which my client believed did not fully reflect the actual gross and net worth of Mr. Kinney. The letter I sent to Mr. Berman explained our concerns

and asked Mr. Berman for some further information. On June 4th, 1984, Your Honor, I received a letter from Mr. Berman, addressing the concerns I had in the letter, together with an exhibit, explaining the same. My client received this information from Mr. Berman by mail on June 11th and at that time, Your Honor, this hearing was set up. I spoke to my client on Thursday. I explained to her that we would probably be going forward today and she told me that she did not have adequate time to evaluate the new information and that she would give me proof by Friday-- well, at that time she requested that I ask this court for a continuance and that she would give me enough information by Friday, in

written form, to show this court that a continuance should be granted. Her concerns--she did leave some papers with me on Friday, Your Honor. Her concerns addressed a lot of the concerns that we discussed previously, and basically she still has concerns that Mr. Kinney has not fully disclosed all of his assets and if given enough time that she would be able to prove that some of these statements in Mr. Kinney's responses to her questions are false. And it's for that reason, Your Honor, that I'm asking for a continuance today. She feels that she is not properly prepared to go to trial and that's--at this time.

THE COURT: Yes, Mr. Berman.

MR. BERMAN: Your Honor, the action was brought in June of '81 and it was

claimed for the trial list in September of '81, and this has been a constant course of conduct by Penelope Kinney since then. The last time it was down was May 18, 1983, and again at the eve of trial, Mrs. Kinney was deciding not to come. At that time her attorney, Andrea Kocay, subpoenaed Mrs. Kinney to come into court. Her own attorney subpoenaed her. But nevertheless, Mrs. Kinney refused to show up and so we appeared before Judge Reicher and Judge Reicher continued the matter against my vehement objection, on the ground that she did have a medical report sent to the court which just said, she is physically unable to attend the hearing. And nothing else. No diagnosis, she wasn't in the hospital or

anything. But nevertheless Judge Reicher did grant a continuance and I have a transcript of that hearing on May 18, 1983. After that hearing, Your Honor, her attorneys withdrew, Januszewski, McQuillan and DeNigris, in that and the grounds were that this Defendant fails to cooperate with counsel, does not respond to telephone calls and correspondence. The attorney/client relationship is broken down and so on. And so they withdrew and now Attorney Roggi is in the case and I have made as complete a discovery as I possibly can and I believe this case--he has more information about my client's financial situation than almost any case that I can imagine and we have gone out of our way to

be cooperative and to answer every question, prepare exhibits in answer to his questions. Not trying to go to court and argue against them, but merely complying with every request that was made. And it is a groundless claim that the discovery has not been satisfied. This is not a large case. My client had his deposition taken and there has been ongoing discovery and for a 1981 case to not go forward because there hasn't been adequate discovery is a rather pointless objection.

THE COURT: Anything further, Mr. Roggi?

MR. ROGGI: No, Your Honor.

THE COURT: I'll deny the request for a a continuance. Now, do we have--do you have a financial affidavit?

MR. ROGGI: Your Honor, I have an affidavit that Mrs. Kinney mailed to me.

It's not signed and it's not even dated, so I don't believe it's actually--

THE COURT: Is there any--have you seen it?

MR. BERMAN: I haven't seen it.

THE COURT: You want to look it over, please?

MR. ROGGI: I can show you something--here you go. It's not signed or dated, but I can represent that that was the last affidavit that was dropped off to me.

THE COURT: While you're looking at it Mr. Berman, I'll swear in Mr. Kinney. Would you stand up please?

HOWARD KINNEY, JR., of 32 Champion Hill Rd., East Hampton, Connecticut, having been duly sworn in by the Court, was examined under oath and testified as follows:

THE COURT: Have you examined this?

MR. BERMAN: Yes, Your Honor, I have examined it and I haven't shown it to my client, but--

THE COURT: Would you like to withhold deciding whether or not you--

MR. BERMAN: Is there a copy or is this the one?

MR. ROGGI: It's the only thing I have.

THE COURT: It's--I suppose strictly it isn't admissable, not having been sworn to, but perhaps Mr. Berman could see his way clear to letting it in.

MR. BERMAN: I really don't object, Your Honor, but we don't accept it as accurate or even that she's alleging that it is accurate. But for whatever probative value it has I have no objection.

THE COURT: You wish the court to have

that?

MR. ROGGI: Yes, Your Honor.

THE COURT: You do? Then I'll--let's consider it as being filed. Of course it's subject to any infirmities it has like not having been sworn to. Is it signed?

MR. ROGGI: No, it's not, Your Honor.

THE COURT: It's not even signed.

MR. ROGGI: It's not even signed.

THE COURT: Maybe it doesn't have any value at all, is that--you think that's so?

MR. BERMAN: Well I don't think I could hold her in contempt for it being inaccurate or for it being deliberately false and so I don't know what value it does have. There are some things on it that I would not accept as accurate.

THE COURT: Well, I'll leave it up to

you, Mr. Berman. If--

MR. BERMAN: Well, like I said, I don't have any objection if Mr. Roggi wishes to submit it, but--

MR. ROGGI: That would be my preference, Your Honor.

THE COURT: That I see it?

MR. ROGGI: Yes.

THE COURT: All right. Let me have it. The record may show that I'm taking it and I'm going to examine it and--ready Mr. Berman?

MR. BERMAN: Yes, Your Honor. * * *

MR. ROGGI: Your Honor, the first matter I would like to bring up is a renewal of my motion for a continuance today. I am here today, Your Honor, without my client. I haven't had an opportunity to discuss with her fully the disclosures of the Plaintiff, Howard

Kinney, concerning his real estate and concerning the transfer and subsequent liquidation of his stock. My client has not been here today to hear his direct testimony here and I've not been able to confer during direct with her, as to any statements she may or may not agree with, that has been presented by Mr. Kinney. I am, today, Your Honor, here on her behalf as her counsel and yet do not have the advantage of her knowledge of the situation and I would ask that this hearing be continued at this time, until such time as I have the opportunity to discuss with her what has gone on during the direct.

MR. BERMAN: Well, Your Honor, I strongly disagree. In fact, it

is no surprise that she isn't here. I don't think I expected her and I told Attorney Roggi that and even suggested that he subpoena her. But I don't believe she would have obeyed the subpoena, so it certainly is a freedom that she has. There's no obligation that she, as a witness, show up in court. As long as she's been made aware that the case is going forward, as I told Mr. Roggi, we really don't need her and really don't care whether or not she chooses to come. It's her right, under our civil practice, that she is not legally obliged to come. It's simply a question of whether or not she thinks it's in her best interest to come.

THE COURT: Well, it seems to me, Mr.

Roggi, that she knows of the hearing and there's no satisfactory reason for not being here. I don't think the court has any course to follow other than to proceed with this hearing. I know you're under a great disability, but it looks to me as though she's been very uncooperative and this man can't be kept out of court indefinitely you know. He's entitled to go forward.

MR. ROGGI: I understand that, Your Honor. I would just like to say on my client's behalf that the matter has been around since 1981. If I did have a week or two maybe, to talk it over with her, she could give me some guidance as to, at least the cross-examination part of it and possibly produce some evidence on her own behalf. I don't

even have the opportunity to put her on the stand today for her own direct examination. I don't think I can conduct a proper cross-examination without her here and I certainly lack any evidence that she may be able to introduce on her own.

THE COURT: I'll deny the request. • • •

Appendix F

CONNECTICUT GENERAL STATUTE
Section 46b-51

Section 46b-51. (Formerly Sec. 46-48). Stipulation of parties and finding of irretrievable breakdown. (a) In any action for dissolution of marriage or legal separation the court shall make a finding that a marriage breakdown has occurred where (1) the parties, and not their attorneys, execute a written stipulation that their marriage has broken down irretrievably, or (2) both parties are physically present in court and stipulate that their marriage has broken down irretrievably and have submitted an agreement concerning the custody, care, education, visitation, maintenance or support of their children, if any, and concerning alimony and the disposition of property. The testimony of

either party in support of that conclusion shall be sufficient.

(b) In any case in which the court finds, after hearing, that a cause enumerated in subsection (c) of section 46b-40 exists, the court shall enter a decree dissolving the marriage or granting a legal separation. In entering the decree, the court may either set forth the cause of action on which the decree is based or dissolve the marriage or grant a legal separation on the basis of irretrievable breakdown. In no case shall the decree granted be in favor of either party.